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Lisa W. Schoenthaler

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January 27, 1994

**VIA HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: Reply Comments of Cablevision Systems Corporation  
MM Docket No. 93-290

Dear Mr. Caton:

It has come to our attention that pages two and three may have been inadvertently omitted from copies of the Reply Comments of Cablevision Systems Corporation, filed in the above-referenced proceeding on January 18, 1994. We are therefore enclosing a complete copy of these comments.

Please call the undersigned should you have any questions regarding this matter.

Sincerely,



Lisa W. Schoenthaler

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )

)  
Amendment of Section 76.51 )  
of the Commission's Rules to Include )  
Newton, New Jersey, and )  
Riverhead, New York in the New York, )  
New York - Linden - Paterson - )  
Newark, New Jersey, Television )  
Market )

MM Docket No. 93-290

To: Chief, Mass Media Bureau

**REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

**RECEIVED**

**JAN 18 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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January 18, 1994

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
I. THE STATIONS HAVE FAILED TO MEET THE CRITERIA FOR REDESIGNATION OF A HYPHENATED TELEVISION MARKET .....	2
II. AVOIDANCE OF COPYRIGHT LIABILITY IS AN INSUFFICIENT BASIS FOR REDESIGNATION .....	6
III. THE STATIONS HAVE FAILED TO DEMONSTRATE ANY PUBLIC BENEFIT FROM THE REQUESTED REDESIGNATIONS .....	9
IV. THERE IS NO JUSTIFICATION FOR ADDING ANY OTHER COMMUNITIES TO THE NEW YORK MARKET .....	9
CONCLUSION .....	10

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To: Chief, Mass Media Bureau

**REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

**INTRODUCTION AND SUMMARY**

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

Nothing in the comments submitted in this proceeding by various television stations justifies an expansion of the New York, New York - Linden - Paterson - Newark, New Jersey television market (the "New York market"). Neither WLIG nor WMBC has demonstrated the "competitive commonality" required to redesignate a television market to include additional communities. The efforts of WTZA and WHAI to include two other communities at the fringe of the New York Area of Dominant Influence ("ADI") are similarly unavailing.

It is clear from their comments that all four stations seek redesignation primarily to expand their must carry rights into distant communities where they would otherwise be subject

to the copyright indemnification obligations imposed by the 1992 Cable Act.<sup>1/</sup> As Cablevision explained in its initial comments, that is not a valid basis for redesignating a television market and would upset the balance between copyright and signal carriage obligations established in the 1992 Cable Act.<sup>2/</sup> In the absence of the requisite showing of competitive commonality, the Commission should not include any of the requested communities in the New York market.

**I. THE STATIONS HAVE FAILED TO MEET THE CRITERIA FOR REDESIGNATION OF A HYPHENATED TELEVISION MARKET**

**WLIG and WMBC.** Neither WMBC's nor WLIG's comments provide any new evidence to bolster their stations' initial, deficient showing of "competitive commonality."<sup>3/</sup> Both stations have failed to provide any evidence in their comments supporting their claim that the stations genuinely compete for audience, programming, and advertising throughout most of the combined market area.<sup>4/</sup> WLIG, moreover, fails to provide any factual underpinning for

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<sup>1/</sup> See, e.g., Comments of WLIG-TV, Inc. at 4 (without indemnification, the distant station "ceases to be a must carry station") ("WLIG Comments").

<sup>2/</sup> As Cablevision noted in its initial comments, the Commission must resolve the issues raised in Cablevision's pending petition to modify the ADIs of the stations at issue here, Petition for Special Relief, In re Petition of Cablevision Systems Corporation for Modification of ADI, CSR-3873-A ("Petition for Special Relief"), prior to or concurrently with the instant proceeding. Any other approach would prejudice Cablevision's Petition for Special Relief by "qualifying" non-local stations for must carry status in communities that may later be found to be outside of the television markets of these stations under the must carry rules. Comments of Cablevision Systems Corporation at 2 ("Cablevision Comments").

<sup>3/</sup> Nor do the Stations' showings meet the criteria set forth in the market modification provisions of the 1992 Cable Act, which U.S. Cablevision and Time Warner propose to be applied in assessing whether to redesignate a station's market for Section 76.51 purposes. See U.S. Cablevision Comments at 4-5, Comments of Time Warner New York City Cable Group at 10-12. See generally Cablevision Petition for Special Relief.

<sup>4/</sup> Cablevision Comments at 3-5.

its claim that its inability to attract national advertising is caused by the exclusion of Riverhead from the Section 76.51 New York Market.<sup>5/</sup> Nor do WMBC and WLIG demonstrate that hyphenation is necessary simply because the stations are located within the expansive New York ADI.<sup>6/</sup> As Cablevision demonstrated in its Petition for Special Relief, the New York ADI contains media outlets that serve the entire region as well as those, like WLIG and WMBC, that serve only parts of the region.<sup>7/</sup> These stations fail to provide local programming or service to many areas encompassed by the New York ADI, as shown in Cablevision's Petition.<sup>8/</sup>

**WTZA and WHAI.** By any measure, WTZA and WHAI have also failed to demonstrate "competitive commonality" with the presently designated communities and the communities of license of the other stations that have sought to be added to the New York market. WTZA's

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<sup>5/</sup>WLIG Comments at 3.

<sup>6/</sup>See WLIG Comments at 2, 9-10; Comments of Mountain Broadcasting Corporation at 4-5 ("WMBC Comments").

<sup>7/</sup>See generally Cablevision Petition for Special Relief; Reply to Oppositions to Petition for Special Relief at 7-8, 17-19, CSR-3873-A (filed Aug. 11, 1993) ("Reply to Oppositions"). For example, as Cablevision noted in its Reply to Oppositions, the Home News and Times serves Yonkers, New York and there are more than 50 community-based newspapers on Long Island, such as the Long Islander and the South Shore Record. Even the New York Times publishes weekly editions directed specifically at Westchester, Long Island, New Jersey and Connecticut, with news and advertising inserts specific to those areas. Reply to Oppositions at 19 n.53.

WLIG asserts that the New York ADI largely coincides with the New York market, presumably as a basis for claiming that the markets should be coextensive. WLIG Comments at 2. As the requests for redesignation illustrate, however, the ADI and New York market are not coextensive -- Kingston, Riverhead, Bridgeport, and Newton are all far removed from each other and the hub of the New York market, New York City. Congress recognized, moreover, that the ADI itself was an imperfect mechanism for gauging a station's television market and created a mechanism by which communities within an ADI could be excluded from a particular station's market. See 47 U.S.C. § 534(h)(1)(C).

<sup>8/</sup>See Cablevision Petition for Special Relief at 15-20.

community of license, Kingston, New York, lies a substantial distance from the communities currently within the New York market, as well as from the proposed designated communities. For example, Kingston is more than 90 miles from Newark, New Jersey, more than 100 miles from New York City, and approximately 80 miles from Newton, New Jersey.<sup>9/</sup> Although WTZA attempts to characterize its Grade B signal as extending "deep into" the 35-mile zones of the New York City stations, it is apparent from the exhibit attached to WTZA's comments that Kingston is remote from New York City, the center of the New York market. The proposed redesignation, moreover, would result in WTZA's hyphenation with communities far beyond its Grade B contour, which fails to reach New York City, Newark, Linden, or Paterson, New Jersey.

WHA1 is also distant from the communities in the presently existing market and those communities proposed to be added to the market. For example, it is more than 60 miles from Newark, New Jersey, 90 miles from Newton, New Jersey, and, by its own calculations, 54 miles from New York City.<sup>10/</sup> Moreover, WHAI's own Grade B contour reveals that its Grade B coverage does not extend into New York City, let alone the presently designated New Jersey communities, Newton, New Jersey or Kingston, New York. Like WLIG and WMBC,

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<sup>9/</sup> Kingston is also approximately 100 miles from Linden, New Jersey and 80 miles or more from Paterson, New Jersey; Newton, New Jersey; and Bridgeport, Connecticut, and even farther from Riverhead, New York.

<sup>10/</sup> Comments of Bridgeways Communications Corp. at 7 ("WHA1 Comments").

WTZA and WHAI are readily distinguishable from stations licensed to communities in the immediate area surrounding New York City.<sup>11/</sup>

Additionally, neither WTZA nor WHAI demonstrates that it competes for audiences, programming or advertising throughout the New York market.<sup>12/</sup> Neither claims that it pays syndicators the full New York market rates for programming nor presents evidence such as market-area program listings to demonstrate that the stations are considered "local" throughout the existing, designated communities.<sup>13/</sup>

Notwithstanding Kingston's evident distance from the presently designated communities, WTZA argues that "the New York ADI, including cities such as Kingston that may appear to be relatively far from other parts of that market, is a unitary tri-state market."<sup>14/</sup> As "proof" of this point, it cites the existence of WNYI, a tri-state cable advertising interconnect.<sup>15/</sup> Contrary to WTZA's claim, however, the operations of WNYI confirm that the New York ADI contains media outlets, such as WTZA, WHAI, WLIG and WMBC, that serve parts of the region as well as those that serve the entire region. While WNYI provides advertisers with a single point of contact to purchase time on all of the systems within the New York ADI, it also

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<sup>11/</sup>Time Warner Comments at 5. Nor are either station's transmitting towers co-located with the towers of the stations' in the existing communities, a relevant factor in prior redesignation proceedings. See id. at 4-5.

<sup>12/</sup>See Request by Press Broadcasting Company, Inc. to Amend Section 76.51 of the Commission's Rules to Include Clermont, Florida, in the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, Television Market, Report and Order, 8 FCC Rcd 3667 (1993).

<sup>13/</sup>See Cablevision Comments at 4-5.

<sup>14/</sup>Comments of WTZA in Support of Inclusion of Kingston as a Designated Community at 8 ("WTZA Comments").

<sup>15/</sup>Id.



breaks down the ADI into four sub-regional "zones" and sells time on a zone-wide basis.<sup>16/</sup> WNYI proves only that small service areas can be tied together into a broader regional market in order to serve advertisers who wish to reach the entire New York ADI.<sup>17/</sup> The market of the stations is no more the entire New York ADI than the circulation area of The Poughkeepsie Journal can be said to include Suffolk County, New York.

## **II. AVOIDANCE OF COPYRIGHT LIABILITY IS AN INSUFFICIENT BASIS FOR REDESIGNATION**

The stations principally seek redesignation as a means of avoiding copyright indemnification, thus permitting them to attain must carry status in communities with which they have no local nexus.<sup>18/</sup> As Cablevision, U.S. Cablevision and Time Warner demonstrated in their initial comments, however, Congress did not intend the 1992 Cable Act to work any fundamental changes in the copyright law. Nor did the Commission seek to make wholesale revisions to the Section 76.51 list, recognizing that such changes "would have significant implications for copyright liability."<sup>19/</sup> Rather, the statute and the Commission's rules

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<sup>16/</sup>For instance, WNYI considers Long Island and northern New Jersey as separate zones. See Cablevision Reply to Oppositions at 18-19 n. 56.

<sup>17/</sup>Since WNYI began in April 1993, regional and nationally-operated businesses have been its largest customers. Additionally, advertisers can independently purchase advertising on local cable systems. Id.

<sup>18/</sup>See, e.g., WTZA Comments at 5-6.

<sup>19/</sup>Must Carry Report and Order, 8 FCC Rcd 2965, 2978 (1993). See also Cablevision Comments 5-7, Time Warner Comments at 8, U.S. Cablevision Comments at 3-4. As U.S. Cablevision and Time Warner note in their comments, the Copyright Office is in the midst of a proceeding to decide whether to acknowledge the Commission's changes to Section 76.51. See Notice of Inquiry, 58 Fed. Reg. 34594 (proposed June 28, 1993). To avoid inconsistent results, and particularly since the Stations' requests are aimed principally at avoiding  
(continued...)

establish a balance between copyright and signal carriage obligations, requiring a station to "qualify" for carriage by indemnifying a cable operator for any increased copyright liability that would result from carriage of that station.<sup>20/</sup>

The stations have failed to provide any reason why they should be relieved of compliance with the copyright indemnification provisions of the 1992 Cable Act, beyond their desire to become regional purveyors of programming.<sup>21/</sup> As Cablevision indicated in its initial comments, that is not a sufficient justification for the relief sought. Section 76.51 is not intended as a vehicle for a station to expand its television market beyond the area it is licensed to serve.<sup>22/</sup> By granting the stations' request to be relieved of their copyright indemnification obligations throughout the ADI, the Commission would be aiding and abetting their efforts to become regional video programmers. Such "relief" contravenes legislative intent. It would be particularly inappropriate here, given the stations' utter inability to demonstrate the

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<sup>19/</sup>(...continued)

copyright liability, Cablevision agrees that the Commission should await guidance from the Copyright Office prior to reaching a decision in this proceeding. See U.S. Cablevision Comments at 6-7, Time Warner Comments at 8 n.16.

<sup>20/</sup>Cablevision Comments at 5-7.

<sup>21/</sup>See, e.g., Comments of WTZA at 12 ("If WTZA cannot get cable carriage because of copyright-royalty indemnity problems . . . WTZA will be unable to reach the large audiences in surrounding areas that are critical to its planned expansion").

<sup>22/</sup>Nor is Section 76.51 intended as a means for a station to expand beyond the area it is physically capable of serving, pursuant to constraints imposed by its license and FCC regulations. If the stations' arguments were accepted by the Commission, a 50,000 watt station would suddenly become the equivalent of a 1 million watt station. Such a result is neither compelled by statute nor justified on policy grounds.

"commonality" between their communities of license and the New York market that is necessary to support a request for redesignation.<sup>23/</sup>

Additionally, the Riverside case on which the stations rely as precedent for their requests is readily distinguishable from the instant proceeding.<sup>24/</sup> The Riverside station, unlike these stations, served the designated communities over-the-air; was located approximately the same distance from the center of the principal market city (Los Angeles) as the other designated communities; and was surrounded by the other designated communities. Its Grade B signal, moreover, encompassed the designated communities.<sup>25/</sup> As demonstrated herein and in the stations' own comments, these critical facts are absent from this case.

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<sup>23/</sup>It is particularly ironic that WTZA now seeks to avoid copyright indemnification obligations outside of its local market. When Cablevision raised concerns that the size and scope of the New York ADI would effectively permit stations to assert must carry status on cable systems far from their local markets, WTZA responded by arguing that the copyright indemnification provisions of the 1992 Cable Act serve as a "built-in safeguard[] to avoid a station acquiring mandatory carriage rights in a community to which it has no service nexus." Joint Opposition of WTZA-TV Associates and WTZA-TV Associates Limited Partnership to Petition for Special Relief, In re Petition of Cablevision Systems Corporation For Modification of the New York ADI, CSR-3873-A (filed July 28, 1993), at 18. In that context, WTZA also suggested that it would not spend its scarce resources to perfect its must-carry rights in areas where it would not be viewed over the air (such as eastern Long Island). *Id.* at 18-19. It is therefore somewhat puzzling that WTZA now seeks to have its community of license included within the New York market, allegedly because it shares a "competitive commonality" with the communities presently included within that market.

<sup>24/</sup>WLIG Comments at 5, citing Amendment of Section 76.51 to Include Riverside, California in the Los Angeles-San Bernardino-Corona-Fontana, California, Television Market, Report and Order, MM Docket No. 93-207, ¶¶ 4-5 (rel. Dec. 7, 1993).

<sup>25/</sup>Amendment of Section 76.51 to Include Riverside, California, in the Los Angeles-San Bernardino-Corona-Fontana, California Television Market, Notice of Proposed Rulemaking, 8 FCC Rcd 4783, 4784 (1993), Report and Order, MM Docket No. 93-207 (rel. Dec. 7, 1993).

### **III. THE STATIONS HAVE FAILED TO DEMONSTRATE ANY PUBLIC BENEFIT FROM THE REQUESTED REDESIGNATIONS**

The stations have failed to demonstrate any benefits that the public would derive from their carriage in communities with which they have no local ties. As Cablevision demonstrated in its Petition for Special Relief and Time Warner demonstrates in its comments in this proceeding, the communities within the New York market already receive service from an abundance of network affiliated, independent and noncommercial stations and cable program services which provide news, public affairs and public service programming directed to the residents of these communities.<sup>26/</sup> Indeed, the public would be disserved by the forced carriage of these non-local stations since such carriage will limit Cablevision's and other cable operators' discretion in offering cable programming of interest to their subscribers and would force those operators to drop such programming.<sup>27/</sup>

### **IV. THERE IS NO JUSTIFICATION FOR ADDING ANY OTHER COMMUNITIES TO THE NEW YORK MARKET**

Not all stations within the New York ADI have requested that their communities be included within the New York market.<sup>28/</sup> As Cablevision indicated in its initial comments,

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<sup>26/</sup> See Cablevision Petition for Special Relief at 13-21, Time Warner Comments at 11.

<sup>27/</sup> Cablevision Petition for Special Relief at 2-3, Time Warner Comments at 2.

<sup>28/</sup> The Commission sought comment on whether hyphenation is warranted for Secaucus, Bridgeport, Poughkeepsie, Kingston and Smithtown. The stations licensed to Poughkeepsie, Secaucus and Smithtown did not request redesignation of the New York market to include their communities of license.

and in keeping with past practice,<sup>29/</sup> the Commission should refrain from adding other communities within the New York ADI to the New York market unless and until the stations licensed to these communities make the particularized showing required to warrant redesignation. Should the Commission feel some relief is warranted for any of the petitioning stations, there are less drastic alternatives than redesignation of the New York market.<sup>30/</sup> As U.S. Cablevision notes, redesignation of that market to include communities at its fringe would also create an undesirable "domino" or "daisy chain" effect that could lead to requests from stations outside the New York ADI for inclusion of their communities within the New York market.<sup>31/</sup> The Commission can and should avoid these unintended and unjustifiable results.

### CONCLUSION

For the foregoing reasons, the Commission should deny WMBC's, WLIG's, WTZA's and WHAI's request for market redesignation. Any other redesignations of the New York

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<sup>29/</sup>See Notice of Proposed Rulemaking in MM Docket No. 93-290 at ¶ 15 n.15, citing Must Carry Report and Order at 2978 n.149; Press Broadcasting Company, Inc., 8 FCC Rcd 3667, n.1 (1993).

<sup>30/</sup>See, e.g., Comments of U.S. Cablevision at 8 (suggesting that stations pursue determinations of significant viewing throughout the market to achieve local status for copyright purposes).

<sup>31/</sup>Comments of U.S. Cablevision at 2, 7-8; cf. Comments of WHAI at 7 (arguing that if Riverhead is included in the New York market, it too must be included, since it is closer to the presently designated communities); Comments of WTZA at 14-15 (arguing that if Poughkeepsie is included in the New York market, it must be included, since its Grade B signal encompasses Poughkeepsie).

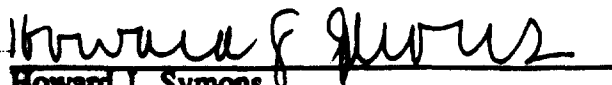
television market should be considered on a case-by-case basis, and only in response to station requests.

Respectfully submitted,

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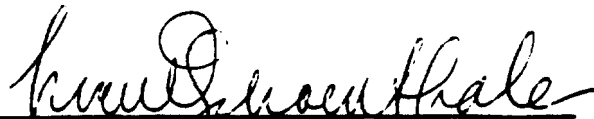
Its Attorneys

January 18, 1994

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## CERTIFICATE OF SERVICE

I, Lisa W. Schoenthaler, do hereby certify that a copy of the foregoing Reply Comments of Cablevision Systems Corporation was served on the following by either hand delivery or first class mail, postage prepaid, this 18th day of January, 1994.

  
Lisa W. Schoenthaler

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